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JAMES H. McKENN

IN THE

Supreme Court of the United States

OCTOBER TERM, 1904

No. 8

HUGH STEVENSON, et al., Appellants

vs.

WM. FAIN, et al., Appellees

BRIEF FOR APPELLEES

JOHN W. GREEN,
Solicitor for Appellees

SAMUEL G. SHIELDS,
Of Counsel

S. B. NEWBAR & CO., KNOXVILLE.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 98

HUGH STEVENSON, ET ALS., Appellants.

vs.

WM. FAIN, ET ALS., Appellees.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

Brief and Argument of John W. Green, Solicitor for Appellees.

STATEMENT OF THE CASE.

The ostensible purpose of the bill in this cause is to remove an alleged cloud upon the complainants' claim to the fee simple title to a large body of land which they aver lies in Monroe County, Tennessee. The real purpose of the bill is to settle the title to said land as between complainants and defendants.

The bill avers that certain wild land which is described in the bill, and which is alleged to be in Monroe County, Tennessee, is owned in fee simple by the complainants under grants from the State of Tennessee, and that complainants are in possession of said land; that the defendants fraudulently procured grants for said land from the State of North Carolina, and are threatening to take possession of it under said grants, and to commit waste upon the same; and that "the title to said land depends upon the location of the State line, which is the

issue in the case, and defendants can have no possible right to it if the lands were subject to grant in the State of Tennessee."

Tr., pp. 3, 4 and 5.

The defendants deny that said land is in Monroe County in the State of Tennessee. They aver that it is in Cherokee County, in the State of North Carolina, and that it was granted by said State to one Mess Fain, the father of defendants, and that upon his death the fee simple title to said land descended to them. They further aver that they and their father have paid the taxes on said land to the State of North Carolina for many years, and had been in the open, notorious, and adverse possession of said land for a period of more than seven years before the bringing of this suit. Tr. pp. 12 **et seq.**

It will thus be seen that the complainants claim this land under grants from the State of Tennessee, while the defendants claim the same land under grants from the State of North Carolina. In settling the title to this land, therefore, it becomes necessary for the Court to find and determine the true location of the State line between the States of Tennessee and North Carolina adjacent to the land in question, as it was run and marked in 1821 by the Commissioners appointed for that purpose by the General Assemblies of said States.

The case was heard and determined by the Honorable C. D. Clark, Judge of the U. S. Circuit Court at Knoxville on April 5, 1901, when it was decreed as follows:

"After hearing the cause, argument of counsel and mature deliberation the Court is of opinion, and doth so adjudge and decree, that the said line between the States of Tennessee and North Carolina as run and located by the Commissioners of said states in 1821, between the said well known point of "Laurel Top" and the well known point to the Southwest of "Laurel Top" known as "Gold Bryson Gap" was run and located by said Commissioners along the extreme height of the

"State Ridge" to the Tellico River, thence up the "Jenk's Knob" to "Gold Bryson Gap," being the line claimed to be the true State line by the defendants as located by the Commissioners in 1821."

The Court accordingly decreed that said land lies in the State of North Carolina and that the title to the same is in the defendants. The complainant's bill was dismissed and they assigned errors and appealed to the United States Circuit Court of Appeals at Cincinnati. (Record, pp. 238-239.)

The cause was heard and determined by the United States Circuit Court of Appeals for the Sixth Circuit at Cincinnati on May 6th, 1902, and the decree of the United States Circuit Court at Knoxville was in all things affirmed. The complainants prayed for and obtained an appeal to this Honorable Court and have assigned errors. (Record, pp. 245, 256, 257, 258, 260.)

QUESTION OF JURISDICTION.

Before submitting our argument upon the merits of the cause we respectfully submit that this Honorable Court has no jurisdiction to review the decision of the Circuit Court of Appeals for the Sixth Circuit dismissing the complainants bill, for the following reasons, to-wit:

First—The jurisdiction of the Federal Courts in this cause is entirely dependent upon the fact that the opposite parties are citizens of different States. It involves no Constitutional question, and under Section 6 of the Act of March 3rd, 1891, Chapter 517, the decision of the United States Circuit Court of Appeals is final and conclusive upon the parties.

Second—Because the only question involved in this law suit is one of fact, namely: In what State are the lands in dispute situated. Or, in other words, are they on the Tennessee or North Carolina side of the State line as "**run and marked**" by the Commissioners appointed for that purpose by the Gen-

eral Assemblies of said States, and "**ratified, confirmed and established as the true boundary line**" by the General Assemblies of said States in the year 1821. (Chap. 35, Tenn. Acts, 1821.)

The United States Circuit Court at Knoxville and the United States Circuit Court of Appeals at Cincinnati have concurred in the finding of fact that the lands in question are in the State of North Carolina, and that the said line runs from the admitted point "County Corner" to the admitted point "Gold Bryson Gap" on said line, along the extreme heighth of what is known as the State and Jenks Ridges between said admitted points. See Tr., pp. 235 to 238 and p. 249 et seq.

The lower Courts having concurred in this finding of fact, we submit that this Honorable Court will not review the case on the facts, as there is abundance of evidence to support the decrees of the lower Courts.

ARGUMENT ON THE MERITS.

The complainants are claiming title to this land under grants from the State of Tennessee. The burden of proof is upon them to establish the charge that said land is within the boundary lines of Tennessee. The State line in question was "**run and marked**" by Commissioners appointed for that purpose by the General Assemblies of the States of Tennessee and North Carolina in the year 1821. The report of these Commissioners is not in the record, and does not seem to be in existence. This report was confirmed by Chapter 35 of the Acts of the General Assembly of the State of Tennessee for the year 1821, which is as follows:

"An Act to establish the boundary line between this State and the State of North Carolina. Passed Nov. 9, 1821.

Section 1. Be it enacted, etc., That the **dividing line run and marked** by Alexander Smith, Isaac Allen and Simeon Perry, commissioners, for and on behalf of this State; and

James Mebane, Montfort Stokes and Robert Love, commissioners for and on behalf of the State of North Carolina; which dividing line as run by said Commissioners, begins at a stone set up on the North side of Cataloochee Turnpike Road, and marked on the West side Ten. 1821, and on the East side N. C. 1821; running thence on a Southwestardly course to the Bald Rock, on the summit of the Great Iron or Smoky Mountain, and continuing Southwestwardly on the extreme height thereof to where it strikes Tennessee River about seven miles above the old Indian Town of Tallassee, crossing Powter's Gap at the distance of twenty-two miles from the beginning, passing Meig's boundary line at thirty-one and a half miles, the Equovettly path at fifty-three miles and crossing Tennessee River at the distance of sixty-five miles from the beginning; **from Tennessee River to the main ridge, and along the extreme height of the same to the place where it is called the Unicoy, or Unaka Mountain,** striking the old trading path leading from the Valley Towns to the Overhills Towns, near the head of the west fork of Tellico River, and at the distance of ninety-three miles from the beginning, thence along the extreme height of the Unicoy or Unaka Mountain to the Southwest end thereof, at the Unicoy or Unaka Turnpike Road; where a corner stone is set up marked Tenn. on the west side and N. C. on the east side, and where a hickory tree is also marked on the South side Ten. 101 M. and on the North side N. C. 101 M., being one hundred and one miles from the beginning; from thence a due course south, two miles and two hundred and fifty-two poles to a spruce pine on the north bank of the Hiwassee River, below the mouth of Cane Creek; thence up the said river the same course, about one mile, and crossing the same to a maple marked W. D. and R. A. on the south bank of the river; thence continuing the same course due south eleven miles and two hundred and seventy-three poles to the Southern boundary line of the State of Ten-

nessee and North Carolina, making in all one hundred and sixteen miles and two hundred and twenty-three poles from the beginning; and striking the southern boundary line twenty-three poles west of a tree in said line marked 72 M. where was set up by said commissioners a square post marked on the West side Ten. 1821, and on the East side N. C. 1821, and on the South side G, **be and the same is hereby ratified, confirmed and established as the true boundary line between this State and the State of North Carolina.** See original Acts, Chap. 35.

We have emphasized that portion of the Act above quoted which has special reference to the matters in controversy. That part of the State line directly in question in this law suit is "from Tennessee River to the Main Ridge and along the extreme height of same to the place where it is called the Unicoi or Unaka Mountain." This Act **ratifies, confirms and establishes** as the true boundary line between this State and the State of North Carolina "**the dividing line run and marked**" by the Commissioners appointed for that purpose.

The Commissioners begun their survey, as stated in the Act of 1821, at the Cataloochee Turnpike Road, and they "run and marked" the State line to the Tennessee river; then "from Tennessee River to the main ridge and along the extreme height of the same to the place where it is called the Unaka or Unicoi Mountain, etc." Now it is admitted that the point marked "County Corner" on this map shown in the opinion of Judge Lurton, Tr. p. 248, is on the extreme height of the "main ridge," which is there called "State Ridge" and that the point marked "Gold Bryson Gap" is on the extreme height of the "main ridge," which is there called "Jenk's Ridge," and that both of these points are on the true State line. The Court is called upon to find and determine the location of the true State line between the admitted points "County Corner" and "Gold Bryson Gap."

The complainants claim that the true State line is, or ought to be located around the red line shown on this map. This line leaves the top of the State Ridge at "County Corner" and runs Southeast about three miles, then curves back Southwesterly, then West to the point called "Gold Bryson Gap" on the Jenk's Ridge. This line leads you 1,400 feet down the flat side of the State Ridge, with a perpendicular descent of 410 feet into the valley called Mitchell Licks, thence a quarter of a mile across Mitchell Licks to where the line begins to ascend again, thence up one tall ridge and down into a valley, over one ridge after another to Gold Bryson Gap. It is twelve miles around this line from County Corner to Gold Bryson Gap.

J. L. Fain's Depo., Tr., pp. 54 and 55.
McClelland's Depo., Tr., pp. 69, 70 and 71.
F. M. Lovingood's Depo., Tr., p. 64.
Hunsuck's Depo., Tr., p. 63.
A. A. Fain's Depo., Tr., pp. 59, 60 and 61.
Hale's Depo., Tr., pp. 42 and 43.

The defendants claim that the true State line "run and marked" by the Commissioners, and "confirmed and established" by the legislature of Tennessee in 1821, continues in a Southwesterly direction from County Corner along the extreme height of the State Ridge for about four and one-half miles to the Tellico River, thence up and along the extreme height of a ridge rising directly across the Tellico River from the State ridge, which is there called "Jenk's Ridge," to Gold Bryson Gap on said ridge. The distance between "County Corner" and "Gold Bryson Gap" along this line, which in all the evidence is spoken of as the black line, is six miles.

McClelland's Depo., Tr., pp. 69, 70 and 71.
Lovingood's Depo., Tr., pp. 64 and 65.
Hunsuck's Depo., Tr., pp. 62 and 63.
A. A. Fain's Depo., Tr., p. 59.

J. L. Fain's Depo., Tr., pp. 54 and 55.
Patton's Depo., Tr., pp. 100 and 101.
I. Lovingood's Depo., Tr., p. 106.
B. Lovingood's Depo., Tr., p. 107.
Wilson's Depo., Tr., pp. 108 and 109.
Hale's Depo., Tr., p. 36.

Complainants admit that the Commissioners did not "run and mark" the State line around the broken chain of ridges indicated by the red line. They insist, however, that while acting under the mistaken belief that the State Ridge from "County Corner" to the Tellico River and thence up and along the Jenk's Ridge to "Gold Bryson Gap" was the "main ridge," they run and marked this chain of ridges as the State line, but that they subsequently discovered their mistake, and simply called for and adopted the broken chain of ridges around the water divide as the State line, without running and marking the same.

Complainants insist further, that the Court should adopt the broken chain of ridges around the red line as the State line, because it is the water divide between the water courses running South in North Carolina and those running North into Tennessee. They insist further that the Act of 1821 does not call for crossing a water course on this part of the State line, and that if this broken chain of ridges is adopted as the true State line it will not cross any water course.

The Act of 1821 does not call for the "water divide" in any part of the State line. It is true that it does not call for crossing the Tellico River, but the fact is clearly proven in this record that at the point where the Commissioners crossed what is now known as the Tellico River in actually running and marking the State line, the so-called Tellico River is only a small branch or creek and was not such a stream as would attract attention of the Commissioners in that wild and uninhabited

mountainous country so as to suggest to them the propriety of mentioning it in their report. It is not even shown that this stream was known as the "Tellico River" at that time.

Patton's Depo., Tr., pp. 100 and 101.
Wilson's Depo., Tr., pp. 108 and 109.
Lovingood's Depo., Tr., p. 105.

It is also true that the complainants witnesses, Payne and Miller, testify that they had conversations with two very old men, one of whom claimed to have been on the State line survey, and that these old men stated to them that the Commissioners run down the State Ridge by mistake, but when they subsequently discovered their mistake they did not go back and mark the line around the "water divide," but "made a plat or call around the heights of the mountain—the water shed." One witness also testified that the same party stated that he was sent back to mark out the State line marks down the State ridge, and to mark the line around the "water divide," and that he did in fact mark out a part of the State line marks on the State Ridge and marked the line around the water divide for some distance.

Miller's Depo., Tr., pp. 94 to 96.
John Miller's Depo., Tr., pp. 97 and 98.
Payne's Depo., Tr., pp. 89 to 91.

When the Commissioners reached the point called "County Corner" in running and marking the State line they were going in a Southwesterly direction, and "Gold Bryson Gap" is six miles southwest from County Corner. The Act of 1821 does not in fact contain any call "around the heights of the mountain—the water shed," as stated by these witnesses. This line around "the water shed" runs southeast for about four miles, a course almost at right angles with the course that the Commissioners had been running up to that time, and there is no such call in

the Act of 1821. **The proof conclusively shows that there are no defacing marks on the State ridge, and that the line around the "water shed" is not marked at all.** So that the information given to these witnesses was clearly erroneous.

McClelland's Depo., Tr., p. 71.
Lovingood's Depo., Tr., pp. 65, 66 and 105.
Fain's Depo., Tr., p. 50.
Hale's Depo., Tr., p. 39.

As has already been stated, it is conceded in this record that the point marked "County Corner" on the State Ridge, and the point marked "Gold Bryson Gap" on the Jenk's Ridge are both on the true state line. The defendants insist that this mountain range called State Ridge on the East side of Tellico River and Jenk's Ridge on the West side of Tellico River is the main ridge called for in the Act of 1821, **and that the Commissioners appointed for that purpose actually run and marked the State line on this chain of ridges.**

In seeking the truth about this matter it must be remembered that the Act of 1821 of the General Assembly of the State of Tennessee provides: "That the dividing line run and marked" by the Commissioners of the States of Tennessee and North Carolina, "from the Tennessee River to the main ridge, and along the extreme height of the same to the place where it is called 'Unicoi' or 'Unaka Mountain' * * * * be and the same is hereby ratified, confirmed and established as the true boundary line between this State and the State of North Carolina." Hence the line that was "run and marked" by the Commissioners, is the line that was "confirmed and established" by the Legislature of the State of Tennessee as the true boundary line. It must also be remembered that when the Commissioners of the States of Tennessee and North Carolina run and marked this line in 1821, there were no settlements in this wilderness of mountains, and the Commissioners were

running and marking the line on what they conceived to be the "main ridge." The Commissioners began this survey, as is shown by the Act of 1821, at the Cataloochee Turnpike Road, and ran it in a southwesterly direction until they reached the admitted point called "County Corner." All of the witnesses testify that standing at "County Corner" and looking southwesterly for the "main ridge" any observer would inevitably adopt the "State Ridge" as the "Main Ridge."

Hale's Depo., Tr., pp. 38 and 39.
Fain's Depo., Tr., pp. 53 and 54.
Hunsuck's Depo., Tr., pp. 62 and 63.
McClelland's Depo., Tr., pp. 69 and 70.
Lovingood's Depo., Tr., pp. 64 and 65.
A. A. Fain's Depo., Tr., pp. 60 and 61.
Wilson's Depo., Tr., pp. 108 and 109.

This State Ridge continues in a southwesterly direction from County Corner for about 4½ miles to the Tellico River, and thence up Jenk's Ridge to "Gold Bryson Gap." This range of ridges is quite as high as the broken chain of ridges around the red line, which the complainants claim to be the true State line. All of the witnesses except the complainants two witnesses, Hale and Waller, say that the State Ridge to Tellico River and the Jenk's Ridge rising directly opposite the State Ridge on the West side of the Tellico River to Gold Bryson Gap, is the main ridge in that vicinity. Hale and Waller admit that there is no spur to lead the Commissioners off of the State Ridge at County Corner and around the broken chain of ridges shown by the red line, and that in order to adopt this chain of broken ridges as the "main ridge" they would have to make a sheer descent into the valley called Mitchell Licks in order to get on the other chain of ridges. The only reason that Hale and Waller can assign for their opinion to the effect that this chain of broken ridges around the red line is the main ridge, is the

fact that it is the water divide between the streams flowing south in North Carolina, and those flowing North into Tennessee.

McClelland's Depo., Tr., pp. 68 to 71.
F. M. Lovingood's Depo., Tr., pp. 64, 65 and 105.
Hunsuck's Depo., Tr., pp. 62 and 63.
A. A. Fain's Depo., Tr., pp. 59, 60 and 61.
J. L. Fain's Depo., Tr., pp. 53 and 54.
Patton's Depo., Tr., pp. 101 and 102.
I. Lovingood's Depo., Tr., p. 106.
B. Lovingood's Depo., Tr., p. 107.
Wilson's Depo., Tr., pp. 108 and 109.
Hale's Depo., Tr., pp. 36, 37, 38 and 39.

As shown above there are two ranges of ridges between County Corner and Gold Bryson Gap, and the distance between these points along the State Ridge line is only six miles, while the distance around the other range of ridges is twelve miles.

The fact that the State Ridge from County Corner to Tellico River and the Jenk's Ridge from the Tellico River to Gold Bryson Gap is the main ridge between these two admitted points on the State line is overwhelmingly established by the testimony in this record. It was manifestly the province of the Commissioners to determine and decide which was the main ridge. They did so decide and actually run and marked the State line on the extreme height of the State ridge to Tellico River, and thence up and along the Jenk's Ridge to Gold Bryson Gap, and then to and along the Unaka Mountains to the Unaka Turnpike. This line is plainly marked with State line marks, and some of the trees containing these marks were "juggled" or "blocked" by the witnesses, and the annular growth of the trees from which these juggles were taken shows clearly that this line was marked with State line marks in the year 1821. The State ridge has gone by that name ever since

the year 1821 because of the fact that the Commissioners did run and mark the State line on it.

McClelland's Depo., Tr., pp. 69, 70, 71 and 72.
F. M. Lovingood's Depo., Tr., pp. 64, 65, 66, 104 and 105.
J. L. Fain's Depo., Tr., pp. 50, 51, 52, 53, 54 and 103.
A. A. Fain's Depo., Tr., pp. 58, 59, 60 and 61.
E. R. Hunsucker's Depo., Tr., pp. 62 and 63.
Patton's Depo., Tr., pp. 100, 101 and 102.
Isaac Lovingood's Depo., Tr. p. 106.
B. F. Lovingood's Depo., Tr., p. 107.
Wilson's Depo., Tr., pp. 108 and 109.
Watson's Depo., Tr., pp. 45 and 46.

There is a holly tree standing about 200 yards west of the Tellico River on the State Ridge line which is plainly marked "86 M." These marks are very old and have the appearance of being as old as those that were "juggled" and which show by their annual growth that they were marked with State line marks in the year 1821. By actual measurement this holly stands 86 miles from the beginning point called for in the Act of 1821 at the Cataloochee Turnpike road.

The Act of 1821 establishing the line between the States of Tennessee and North Carolina fixes the distance from the beginning point at the Cataloochee Turnpike Road to the Unaka Turnpike at the Southwest end of the Unaka Mountains at 101 miles. All of the witnesses agree that the distance from the Cataloochee Turnpike Road along the State ridge line by actual measurement to the 101 mile post is 100 miles and six-tenths. On the other hand, if you adopt the course along the broken chain of ridges indicated by the red line on the map, that being the line insisted upon by the complainants, the distance by actual measurement from the Cataloochee Turnpike

Road to the 101 mile post is 106 miles, or about five miles too much.

McClelland's Depo., Tr., pp. 70, 71 and 72.
Hale's Depo., Tr., pp. 43 and 44.
J. L. Fain's Depo., Tr., pp. 51 and 52.
Patton's Depo., Tr., pp. 100 and 101.
Lovingood's Depo., Tr., pp. 64 and 65.

A number of witnesses testify to conversations had with very old men who were on the State line survey with the Commissioners. These old men stated to the witnesses that the true line between the States of Tennessee and North Carolina was run and markd by the Commissioners in 1821 on the top of the State ridge to the Tellico River, thence up the Jenk's Ridge to Gold Bryson Gap. They even remembered the fact that this holly stood 86 miles from the Cataloochee Turnpike road.

Watson's Depo., Tr., pp. 45 and 46.
E. R. Hunsucker's Depo., Tr., pp. 62 and 63.
Patton's Depo., Tr., pp. 100, 101 and 102.
B. F. Lovingood's Depo., Tr., p. 107.
Isaac Lovingood's Depo., Tr., p. 106.

It will thus be seen that the line running from Laurel Top on the extreme height of the State Ridge in a southwesterly course to County Corner, and continuing along the State Ridge in a southwesterly course to Tellico River, and thence up and along the Jenk's Ridge to Gold Bryson Gap, and thence to the 101 mile post has all of the following facts to support the claim of defendants—that it is the true State line, to-wit:

(1)—It runs the general course called for in the Act of 1821 upon the extreme height of the main ridge between the admitted points "County Corner" and "Gold Bryson Gap."

(2)—By following this line, we get the approximate distance

called for in the Act of 1821, between the Cataloochee Turnpike Road and the Unaka Turnpike.

(3)—It is plainly marked with State line marks, and the juggles taken from some of these marked trees show that it was marked in the year 1821. There is no other marked line between the admitted points on the State line called "County Corner" and "Gold Bryson Gap."

(4)—This line has always been known as the State line by the oldest inhabitants who know anything about the matter, and the ridge upon which it runs is known as the "State Ridge," because the Commissioners run and located the State line on it.

From all of these facts it can not be doubted that the Commissioners of the States of Tennessee and North Carolina, believing that the State Ridge to the Tellico River and the Jenk's Ridge to Gold Bryson Gap and thence to the Unaka Mountains was the main ridge, "run and marked" the State line along the extreme height of this range of ridges. The Legislature of the State of Tennessee ratified, confirmed and established as the true boundary line between this State and the State of North Carolina, the line thus run and marked by said Commissioners.

We submit, therefore, that there is no error in the decree of the lower Court, and that it should be affirmed.

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